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ALEXANDER L. STEVAS,
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No. 82-353

in the

SUPREME COURT OF THE UNITED STATES

October Term, 1982

CITY OF LONG BEACH,

Petitioner,

vs.

RICHARD BOZEK,

Respondent.

RESPONSE TO A PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

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THE ISSUE PRESENTED

(AS REPHRASED BY RESPONDENT)

Will the right to petition be chilled by the ability of government to sue every unsuccessful petitioner?1/

1. The original appeal in this matter arose from a general demurrer. The use of this device required respondent to admit all the allegations of the complaint, including the averment that the prior action had been maliciously instituted. Petitioner has worked this legal fiction at every trun to complain that only the person who maliciously sues is protected. However, malice is easily plead, such as in this case where petitioner filed an unverified complaint. The unsuccessful citizen may well be forced to capitulate or face ruinous legal expenses long before the allegations of a complaint alleging malice are ever put to the test. In this manner, government might intimidate even a citizen, who has a sufficient basis for his complaint, but is unsure as to whether he will prevail.

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REASONS FOR DENYING WRIT

A. THE STATE COURT'S OPINION IS SUPPORTED BY ADEQUATE STATE GROUNDS.

The California Supreme Court's analysis, and decision, in this matter is based upon the right to petition for redress as guaranteed by the Federal

Constitution, and Article I, Section III, of the California Constitution (Petition for Writ of Certiorari, hereinafter referred to as "PC" Appendix "A", P.4, 6 & 8). A judgment which rests upon two independent and adequate grounds, one federal and the other non-federal, is not subject to review by the United States Supreme Court (Cramp v. Board of Public Instruction (1961) 368 U.S. 278). The use of Federal cases to interpret a State Constitution does not diminish the non-federal basis of a decision, if, as in this matter, those authorities are only used as persuasive authority in reaching an independent interpretation (Jankovich v. Indiana Toll Road Com. (1965) 379 U.S. 487).

In the present matter the California Supreme Court could have reached the same holding by only using Article I,

Section III of that State's Constitution. Respondent submits that this independent state ground prevents the granting of petitioner's Writ of Certiorari.

B. THE DECISION OF THE CALIFORNIA SUPREME COURT IS CORRECT.

Petitioner continues to mistakenly cite Times v. Sullivan, 376 U.S. 254 (1964) (PC p.6, 7). This is because it fails to recognize that the Times decision was limited to public officials Times v. Sullivan, supra, 376 U.S. 254, 256. In fact, the majority opinion, and the concurring opinion by Justice Goldberg, expressly cautions government not to view that decision as allowing it to sue for libel (Id., at p.291, 299).

Consider the illogic of the syllogism advance by petitioner: (1) the right to free speech and petition are

protected equally but not absolutely; (2) speaking or petitioning a known falsity falls beyond the constitutional protection; (3) therefore, government can sue for libel or malicious prosecution upon alleging actual malice. This conclusion is directly contrary to Times v. Sulivan, supra, 376 U.S. 254, and Board of Education v. Marting (1957) 217 N.E.2d 712; Johnson City v. Cowles Communications, Inc. (1972 Tenn) 477 SW.2d 750; State v. Time, Inc. (1971 La) 249 So.2d 328, Writ denied 252 So.2d 456; Progress Development Corp. v. Mitchell (1963 D.C. Ill.) 219 F.Supp 156; City of Albany v. Meyers (1929) 99 Cal. App. 561; City of Chicago v. Tribune Company (1923) 139 N.E.86.

The right to petition has a symbiotic relationship with those other First Amendment rights with which it exists

in conjunction (Thomas v. Collins (1944) 323 U.S. 516; and, De Jong v. Oregon (1937) 299 U.S. 353). It is for this reason that the same standard of protection must apply to both free speech and the right to petition. Under present law, that privilege, as against government, is absolute except for advocating the violent overthrow of the government(De Jong v. Oregon, supra, 299 U.S. 353; Times v. Sullivan, supra, 376 U.S. 254).

Therefore, respondent submits that the California Supreme Court's decision in this matter is correct, and that no reason exist for granting petitioner's request for Writ of Certiorari.

C. THE DECISION OF THE CALIFORNIA SUPREME COURT IS FAIR.

Under current California law a public entity, such as the petitioner,

and its employees are given immunity against a suit for malicious prosecution (California Government Code, §815.2 & 821.6). There was no concomitant immunity recognized for citizens who unsuccessfully petitioned, prior to the California Supreme Court's decision in this matter. Justice Brennan, the author of the Majority Opinion in Times v. Sullivan, (1964) 376 U.S. 254, additionally justified, extending additional immunity to citizens charged with libeling public officials by observing:

> "In Barr v. Matteo, 360 U.S. 564, 575, this Court held the utterance of a federal official to be absolutely privileged if made within the outter perimeter of his duties. The states accord the same immunity to statements of their highest officers, although some differentiate their lesser officials and qualify the privilege they enjoy. But all hold that all officials are protected unless actual malice can be proved. The reason for the official privilege is said to be that the

threat of damage suits would otherwise inhibit the fearless, vigorous and effective administration of policies of government and dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties. Barr v. Matteo, Supp, 360 U.S., at 571. Analogous considerations support the privilege for the citizen-critic of government. It is as much his duty to criticize as it is the officials duty to administer. See Whitney v. California, 274 U.S. 357,375 (concurring opinion of Mr. Justice Brandeis), quoted supra, p.270. As Madison said, see supra, p.275 'the censorial powers are in the People over the government, and not in the government over the People.' It would give public servants an unjustified preference over the public they service, if critics of official conduct did not have a fair equivalent of the immunity granted to the officials themselves.' (Times v. Sullivan, supra, 376 U.S. 254, 282-283).

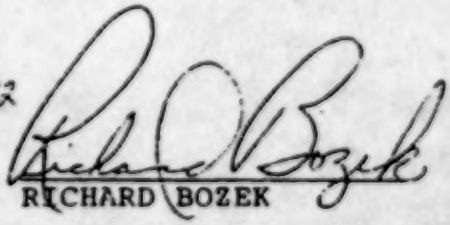
Petitioner may bitterly complain of the California Supreme Court's decision

but it only gives citizens a fair equivalent of the immunity long enjoyed by Petitioner. The state court's decision has rendered the parties to a state of parity, therefore, it is fair and a hearing should not be granted by this Court.

CONCLUSION

Respondent respectfully submits that the Court should not grant the Petition for Writ of Certiorari in this matter since the decision of the California Supreme Court was based on adequate state grounds, was a correct interpretation of the law and was fair to all the parties.

DATED: November 8, 1982



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